

# **EXHIBIT A**

COPY

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Endorsed  
FILED  
San Francisco County Superior Court

MAR 02 2006

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BY: CAROLYN BAUSTREIER  
Deputy Clerk

Attorneys for Respondents  
CITY AND COUNTY OF SAN FRANCISCO AND  
MICHAEL HENNESSEY

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO  
UNLIMITED CIVIL JURISDICTION

WILLIAM SETZLER,  
Petitioner,

vs.

MICHAEL HENNESSEY, and CITY  
AND COUNTY OF SAN FRANCISCO,  
Respondents.

Case No. 313725

NOTICE OF ENTRY OF STATEMENT OF  
DECISION DENYING MOTION TO GRANT  
WRIT PETITION

Hearing Date: July 18 and Dec. 8, 2005  
Hearing Judge: Hon. James. L. Warren  
Time: 9:30 a.m.  
Place: Dept. 301

Date Action Filed: July 19, 2000  
Trial Date: n/a

1  
2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on March 1, 2006, the Court entered its Statement of  
4 Decision Denying Motion to Grant Writ Petition. A true and correct copy of the decision is  
5 attached as Exhibit A.

6 Respectfully submitted,

7  
8 Dated: March 1, 2006

9  
10 DENNIS J. HERRERA  
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ELIZABETH S. SALVESON  
Chief Labor Attorney  
11 ANTHONY GRUMBACH  
Deputy City Attorney  
12

13  
14 By: 

15 ANTHONY GRUMBACH

16 Attorneys for Defendant  
CITY & COUNTY OF SAN FRANCISCO  
AND SHERIFF MICHAEL HENNESSEY  
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CITY AND COUNTY OF SAN FRANCISCO AND  
9 MICHAEL HENNESSEY

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SAN FRANCISCO  
12 UNLIMITED CIVIL JURISDICTION

13 WILLIAM SETZLER,  
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15 vs.

16 MICHAEL HENNESSEY, and CITY  
17 AND COUNTY OF SAN FRANCISCO,  
18 Respondents.

Case No. 313725

~~[REVISED PROPOSED]~~ STATEMENT OF  
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GRANT WRIT PETITION

Hearing Dates: July 18 & Dec. 8, 2005  
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1 This matter came on for hearing on Monday, July 18 and December 8, 2005, before the  
 2 Honorable Judge James L. Warren in Department 301 of the above-entitled Court, with appearances  
 3 by counsel as follows: City Attorney Dennis J. Herrera, through Deputy City Attorney Anthony  
 4 Grumbach, appeared for Respondents Sheriff Michael Hennessey and City and County of San  
 5 Francisco (collectively, the "City"); Edward L. Faunce, J.D., of Faunce, Singer & Oatman, a  
 6 Professional Corporation, appeared for Petitioner William Setzler.

7 On June 3, 2005, Setzler filed a motion requesting the Court to grant the petition for a  
 8 traditional writ of mandate that he filed on July 19, 2000 (the "Petition"). Setzler contends that the  
 9 City violated Government Code section 21153, a provision of the Public Employees' Retirement  
 10 Law (the "PERL"), Government Code sections 20000-21703. Section 21153 provides that if an  
 11 employee is eligible for a disability retirement under the PERL, the employer may not separate the  
 12 employee because of the disability. Setzler contends that the City had a ministerial duty under  
 13 section 21153 to reinstate him when his disability retirement application was denied and that the  
 14 City violated this duty.

15 The Court has reviewed and considered the pleadings, evidence, and oral arguments  
 16 submitted by the parties. This matter having been fully argued and considered, and proof being  
 17 made to the satisfaction of the Court,

18 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

19 The Petition is DENIED in its entirety. The City shall recover its costs.

20 The Court's decision is based solely on admissible and relevant evidence. The City filed  
 21 written objections to Setzler's evidence and preserved the objections by asking the Court to rule on  
 22 them during oral argument. *Biljak Ass'n v. First Interstate Bank* (1st Dist. 1990) 218 Cal.App.3d  
 23 1410, 1419-1420, superseded by statute on other grounds as stated in *Scheiding v. Dinwiddie*  
 24 *Constr. Co.* (1st Dist. 1999) 69 Cal.App.4th 64, 72.

25 The Court bases its decision on the following grounds: (1) Setzler has not shown that the  
 26 City has a clear, ministerial duty under section 21153 to reinstate him; (2) Setzler cannot show that  
 27 the City separated him in violation of section 21153 because: (a) the doctrines of issue and claim  
 28 preclusion bar Setzler from relitigating his previously rejected argument that the City refused to

1 return him to work, and (b) even if the Petition is not precluded, it lacks merit; (3) Setzler comes to  
 2 the Court with unclean hands; and (4) the Petition fails on procedural grounds because Setzler:  
 3 (a) waited five years before bringing the Petition to hearing, and (b) failed to exhaust his  
 4 administrative remedies.

## FINDINGS OF FACT

### I. FACTUAL BACKGROUND

5  
 6 Setzler joined the City's Sheriff's Department as a probationary deputy sheriff in May 1989.  
 7 (Benjamin Decl. ¶ 6, Ex. B at 33:19-22.) After training, Setzler was assigned to the County Jail.  
 8 (*Id.* at 37:15-17.) He admits that did not want to work at the jail because he felt the working  
 9 conditions were "intolerable." (*Id.* at 54:14-25, 55:1-19.)

10  
 11 On January 2, 1990, seven months into his probationary period, Setzler encountered a gate at  
 12 the jail that would not open. (*Id.* at 45:21-25, 46:1-8.) Setzler kicked the gate with his left foot.  
 13 (*Id.* at 46:3-8; 47:19-23.) The gate opened, and Setzler went on with his duties. (*Id.* at 48:5-10.)  
 14 Later during Setzler's shift, he reported that his foot hurt. (*Id.* ¶ 6, Ex. G.)

15 Since leaving work at the end of his January 2, 1990 shift, Setzler has not returned to work.  
 16 (*Id.* ¶ 6, Ex. B 50:22-25.) Claiming to have injured his foot so severely that he could not work as a  
 17 deputy sheriff, Setzler sought to retire with a full disability pension. (*Id.* ¶¶ 4-7.) Even after the  
 18 Retirement Board denied his disability retirement application in 1996, Setzler did not return to  
 19 work. (Harrigan Decl. ¶¶ 3-12; see also below at 3-6 (discussing procedural history of Setzler's  
 20 disability retirement application)).

21 But at all times since January 2, 1990, Setzler has remained a City employee, staying on  
 22 leave for over 15 years. (Harrigan Decl. ¶¶ 3-12; Grumbach Decl. Ex. F ("Setzler Depo.") at 83.)  
 23 He received full disability pay under Labor Code section 4850 between January 1990 and January  
 24 1991, and maintained his full pay through a combination of workers' compensation benefits, sick  
 25 leave, vacation pay, and vocational rehabilitation allowances until at least March 1996. (Benjamin  
 26 Decl. Ex. EE at 10.) And during Setzler's entire 15-year leave of absence, he has continued to  
 27 receive his employee benefits, such as his City-paid health insurance benefits. (Setzler Depo.  
 28 at 756:11-16.)

1 Although the City does not have permanent modified duty positions for deputy sheriffs, the  
 2 City has repeatedly offered Setzler three ways to return to work: (1) return to full duty as a deputy  
 3 sheriff if he was medically capable of performing the job's essential functions; (2) return to full duty  
 4 as a deputy sheriff with reasonable accommodations that would allow him to perform the job's  
 5 essential functions;<sup>1</sup> or (3) transfer to another position under the City's disability transfer program.  
 6 (Harrigan Decl. ¶¶ 5-12, Ex's A-D.)

7 But Setzler has not returned to work. (Setzler Depo. at 382:2-10, 397:22-398:3, 505:15-  
 8 506:15.) While consistently maintaining that he cannot return to full duty as a deputy sheriff,  
 9 Setzler has also declined to participate in the City's disability accommodation process, under which  
 10 he could return to work as a deputy sheriff with reasonable accommodations or obtain a disability  
 11 transfer to a new position. (Harrigan Decl. ¶¶ 5-12, Ex. D at 1, 3; Setzler Depo. at 30:21-23, 35:8-  
 12 20-21, 36:21-37:2, 151:20-152:17.)

13 The City also provided Setzler with vocational rehabilitation to become a computer  
 14 technician through the City's worker's compensation system. (Setzler Depo. at 744-746.) But  
 15 Setzler has not worked as a computer technician, either for the City or other employers. (*Id.* at 756-  
 16 758.)

## 17 II. PROCEDURAL HISTORY

### 18 A. The Retirement Board Denies Setzler's Disability Retirement Application

19 As early as September 1990, Setzler began contemplating a disability retirement. (Benjamin  
 20 Decl. ¶ 6, Ex. B 72:24-25, 73:1-15.) Although he had worked only seven months for the City  
 21 before his alleged injury, and had not even completed his probationary period, Setzler had already  
 22 researched what his disability retirement benefits would be under the Public Employees Retirement  
 23 System ("PERS"). (*Id.* at 73:7-15.)

24  
 25  
 26 <sup>1</sup> Working in a full duty assignment with an accommodation is different than working in a  
 27 modified or light duty assignment. In full duty assignments with accommodations, employees  
 28 receive accommodations—for example, being allowed to stretch at regular intervals—but still  
 perform their jobs' essential functions. In modified or light duty assignments, employees do not  
 perform all of their jobs' essential functions. (Harrigan Decl. ¶¶ 13-14.)

1 On December 30, 1991, Setzler applied for a disability retirement, claiming that he suffered  
 2 a disabling foot injury when he kicked the gate at the jail. (*Id.* ¶ 4.) According to Setzler, this  
 3 injury caused him to limp, required him to walk with a cane, and upset his sense of balance so  
 4 severely that he had trouble walking on stairs or even just carrying a cup of coffee. (*Id.* ¶ 7, Ex. B  
 5 at 59:9-24, 62:18-23, 63:2-17, 65:21-25, 66:1-11.)

6 In 1994, a state administrative law judge ("ALJ") conducted a hearing on Setzler's  
 7 application. (*Id.* Ex. E.) The ALJ denied Setzler's application. (*Id.*) The evidence supporting the  
 8 ALJ's decision included:

- 9 • the lack of objective medical evidence that Setzler was disabled, coupled with medical  
 10 reports from doctors who concluded that he was not disabled (*id.* Ex's E, I, J);
- 11 • testimony from a witness who saw Setzler walking without a limp in City Hall—until  
 12 Setzler turned to walk into the Sheriff's office, when he began limping (*id.* Ex. C 15:8-25,  
 13 16:1-14);
- 14 • videotape of Setzler walking normally without a cane, including shots of him ascending  
 15 and descending stairs and carrying luggage in both hands without a limp or balance  
 16 problems (*id.* Ex. D at 10); and
- 17 • evidence that Setzler had taken three, lengthy vacations in Europe since allegedly  
 18 injuring his foot (*id.* Ex. B at 93-97).

19 Adopting the ALJ's decision, the Retirement Board denied Setzler's application in May 1996  
 20 and denied his petition for reconsideration in July 1996. (*Id.* ¶¶ 5, 9, Ex. F.)

## 21 B. The First Petition

### 22 1. The Court decides that Setzler failed to make a good faith effort to 23 return to work

24 On July 11, 1996, Setzler filed his First Petition, an administrative mandate action under  
 25 California Code of Civil Procedure section 1094.5. In the First Petition, Setzler asked the Court to  
 26 overturn the Retirement Board's denial of his disability retirement application. (Benjamin Decl.  
 27 Ex. K.) Setzler repeatedly argued that the City had refused to return him to work. (*Id.* ¶¶ 10-12,  
 28 Ex. J at 8:16-19, Ex's M-O.)

1 Following a three-day trial before Judge William Cahill, the Court denied the First Petition  
2 on February 25, 1997. (*Id.* ¶ 13, Ex. L.) Setzler appealed. (*Id.* Ex. R.)

3 Before the appeal was heard, the parties found that a videotape that a deputy city attorney  
4 had lodged with the Court was not an accurate copy of the videotape entered into evidence in the  
5 administrative hearing. (*Id.* ¶¶ 15-18.) The matter was remanded to the ALJ and the Retirement  
6 Board to authenticate the actual videotape and reconsider Setzler's disability retirement application.  
7 (*Id.*) On remand, the ALJ authenticated the videotape, and the Retirement Board affirmed its denial  
8 of Setzler's application. (*Id.*)

9 The proceedings on the First Petition returned to the Court, with Judge Raymond D.  
10 Williamson presiding. (*Id.* ¶ 19, Ex. W.) Setzler again argued that the City had refused to return  
11 him to work. (*Id.* Ex's X, Y at 4-5).

12 In an August 25, 1998 decision, the Court again denied the First Petition. (*Id.* Ex. W.) In  
13 the decision, the Court considered and rejected Setzler's "contention that he is entitled to a disability  
14 pension on the ground that the City has refused to return him to work. *The evidence fails to*  
15 *establish that petitioner has made a good faith effort to return to work.*" (*Id.* at 2 (emphasis  
16 added).) The Court also found that Setzler's claims about his alleged disability were not credible.  
17 (*Id.*)

18 **2. Denying Setzler's motion for a new trial, the Court concludes that**  
19 **Setzler is a "malingerer" who "has not done what was necessary to get**  
20 **himself reinstated"**

21 Setzler then moved for a new trial. (*Id.* ¶¶ 25-29; Ex's CC1-CC4.) He argued that the Court  
22 had erred in ruling that Setzler had failed to make a good faith effort to return to work. (*Id.* Ex's  
23 CC-2 at 3-5, CC-3 at 7:20-11:26.)

24 The Honorable David A. Garcia heard the new trial motion. (*Id.* Ex's CC-3, CC-4.)  
25 Denying the motion, the Court concluded that Setzler was a "malingerer" who had not made a good  
26 faith effort to return to work. (*Id.*) Judge Garcia explained that:

27 *[i]f the weight of the evidence supports the decision that he's not disabled,*  
*then categorically the weight of the evidence supports the decision that he's*  
*malingering. And that he has not done what was necessary to get himself*  
*reinstated to the job. Okay?*

1 *Because this is what this is about, isn't it? He's either disabled or he's a*  
 2 *malingeringer. And as cold and as cruel [as] that may sound, that's what it's*  
 3 *about. And that's where my analysis is. And that's where it's going to rest.*  
 4 *(Id. Ex. CC-3 14:4-12 (emphasis added).)*

5 3. Upholding the denial of the First Petition, the court of appeal affirms  
 6 that Setzler did not make a good faith effort to return to work

7 Setzler appealed. (*Id.* ¶ 30, Ex. DD.) He again argued that the Court should have granted  
 8 his First Petition because the City had refused to return him to work. (*Id.* Ex. EE at 17-19.)

9 In an unpublished April 11, 2000 decision, the court of appeal upheld the denial of Setzler's  
 10 First Petition. (*Id.* Ex. FF.) In reaching this decision, the court of appeal specifically affirmed the  
 11 Court's findings that: (1) Setzler's claims about his alleged disability were not credible, and  
 12 (2) Setzler had not made a good faith effort to return to work. (*Id.* Ex. FF 6-8.)

13 When the court of appeal remitted its opinion to the Court on June 13, 2000, the judgment  
 14 on the First Petition became final. (*Id.* Ex. GG.)

### 15 C. The Second Petition

16 On April 28, 1999, while Setzler's appeal in the First Petition proceeding was pending, he  
 17 filed another petition (the "Second Petition") seeking a traditional writ of mandate (Code of Civ.  
 18 Proc. § 1085). (Grumbach Decl. Ex. C.) In the Second Petition, Setzler again argued that the City  
 19 had refused to return him to work and sought an order "reinstating" him to a position as a deputy  
 20 sheriff. (*Id.*) On December 13, 1999, the Court, with the Honorable Judge Ronald E. Quidachay  
 21 presiding, sustained the City's demurrer without leave to amend on the grounds that the Second  
 22 Petition was not ripe because the First Petition was still pending. (*Id.* Ex's D, E.)

### 23 D. The Petition

24 On July 19, 2000, the month after the judgment denying the First Petition became final,  
 25 (Benjamin Decl. Ex. GG), Setzler filed the Petition. (Grumbach Decl. Ex. A.) In the Petition, he  
 26 seeks a traditional writ of mandate under Code of Civil Procedure section 1085 ordering the City to  
 27 return him to work as a deputy Sheriff with back pay and other monetary relief dating to 1991. (*Id.*)  
 On September 5, 2000, the City filed its response to the petition. (*Id.* Ex. B.) On June 3, 2005—  
 almost five years after the Petition was filed—Setzler filed a motion asking the Court to grant the  
 Petition. (Setzler Motion at 1-2.) As before, he argues that he is entitled to writ relief because the  
 City allegedly refused to return him to work. (Setzler Brief at 1.) He seeks a writ of mandate

1 ordering the City to "reinstate" him with full back pay and benefits from one of three alternative  
 2 dates in 1991, 1996 and 2000 when Setzler alleges that the City refused to return him to work. (*Id.*  
 3 at 8-10.)

## 4 LEGAL ANALYSIS

### 5 I. STANDARD OF REVIEW FOR SECTION 1085 WRIT PETITIONS

6 Code of Civil Procedure section 1085(a) provides that traditional mandate may issue "to  
 7 compel the performance of an act which the law specifically enjoins, as a duty resulting from an  
 8 office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or  
 9 office to which the party is entitled. . . ."

10 Traditional mandate under section 1085 will lie "to compel performance of a clear, present  
 11 and usually ministerial duty in cases where a petitioner has a clear, present and beneficial right to  
 12 performance of that duty." *County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965,  
 13 972. Where the respondent has not violated a purely ministerial duty, writ relief is generally  
 14 unavailable under section 1085 unless the respondent's "decision was arbitrary, capricious, or  
 15 entirely lacking in evidentiary support." *DeCuir v. County of Los Angeles* (1998) 64 Cal.App.4th  
 16 75, 81.

17 The petitioner bears the burden of establishing both that the respondent has a duty to  
 18 perform an act and that the petitioner has a substantial right to the performance of that act. *San*  
 19 *Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 771.

### 21 II. THE PERTINENT LAWS ARE THE PERL AND THE CITY'S PERSONNEL 22 POLICES

23 Although the City has its own retirement system that covers most of its employees, the City  
 24 has contracted with the PERS to provide retirement benefits to the City's deputy sheriffs. See San  
 25 Francisco Charter § A8.506. Therefore, the PERL applies to the City's deputy sheriffs. *Duff v. City*  
 26 *of Gardena* (1980) 108 Cal.App.3d 930, 933-934 (applying the PERL to local safety officer whose  
 27 employer had contracted with the PERS to provide retirement benefits).

But while the PERL governs Setzler's retirement benefits, the personnel policies of a charter city remain municipal affairs. *Gourley v. City of Napa* (1st Dist. 1975) 48 Cal.App.3d 156, 163-164. The City, therefore, retains its authority to administer its own Civil Service Rules and personnel policies, which continue to govern Setzler's employment with the City as long as they are not inconsistent with the PERL. *Id.*; *Duff*, 108 Cal.App.3d at 936-937 (PERL did not limit a city's right to terminate a probationary employee for reasons unrelated to the employee's alleged disability); *Campbell v. City of Monrovia* (1978) 84 Cal.App.3d 341, 350 (holding that while the PERL controls "the requirements for PERS member retirements, [it does] not define the nature or extent of factors, like the right to sick leave, which are peripheral thereto and which are properly within the control of a contracting agency").

Largely ignoring the PERL and the City's personnel policies, Setzler relies on two laws that do not apply to him or the City. First, he relies on a law that is irrelevant because it governs only county employees' retirement benefits: the County Employees' Retirement Law Act of 1937 (the "CERL"), Government Code sections 31450-31898. The CERL and the PERL are distinct statutory schemes, with different provisions. *Pennington v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 55, 58-60. As explained in *Pennington*, the Legislature "created two distinct kinds of retirement systems, each of which may include deputy sheriffs among its members:" the CERL and the PERL. *Id.* at 58. Because, "[t]he acts of the Legislature have treated PERS members differently from CERL members," courts "must assume it intended the distinctions." *Id.* at 60.<sup>2</sup>

<sup>2</sup> Citing *McGriff v. County of Los Angeles* (1973) 33 Cal.App.3d 394, Setzler appears to argue the PERL entirely preempts the City's civil service rules and personnel policies. This argument is misguided. First, *McGriff* concerned a county employee whose retirement benefits were governed by the CERL, which, as explained above, does not apply to the City or Setzler. Second, at least three courts of appeal have held that the PERL does not entirely preempt charter cities' authority in personnel matters. *Gourley*, 48 Cal.App.3d at 163-164; *Duff*, 108 Cal.App.3d at 936-937; *Campbell*, 84 Cal.App.3d at 350. Third, in *McGriff* the county, unlike the City, had adopted the entire CERL as a local ordinance, which caused the court to conclude that the later adopted CERL provisions were controlling rather than the general civil services rules that the county had previously enacted. 33 Cal.App.3d at 399 ("It is well established that [w]here the terms of a later specific statute apply to a situation covered by an earlier general one, the later specific statute controls." *Id.*, internal quotations omitted.)

Second, Setzler relies on Government Code section 19253.5, a provision of the State Civil Service Act (Gov't Code §§ 18500-19799). This act, however, applies only to state employees, not the City's employees. Gov't Code § 18526 (under State Civil Service Act, an "'employee' means a person legally holding a position in the State civil service").

These distinction between the PERL and the City's personnel policies on the one hand, and the CERL and the State Civil Service Act on the other, are significant. Setzler relies exclusively on cases and administrative authorities involving statutes that do not apply to him or the City. He cites several cases that interpret the CERL. And he cites an Attorney General's opinion and State Personnel Board opinions that interpret the PERL and State Civil Service Act as they apply to state employees. But he fails to cite any authority regarding the duties that the PERL imposes on a municipal employer like the City.

### III. SECTION 21153 DOES NOT IMPOSE A CLEAR, MINISTERIAL DUTY ON THE CITY TO REINSTATE SETZLER

Setzler contends that the City had a clear, ministerial duty under section 21153 of the PERL to reinstate him with full back pay when his disability retirement application was denied, and that the City failed to perform that duty. (Setzler Op. Brief at 3.) Section 21153 provides that:

Notwithstanding any other provision of law, *an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled,* unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731. (Gov't Code § 21153 (emphasis added).)

Whether section 21153 imposes a clear, ministerial duty on the City to reinstate Setzler presents a question of law that the Court reviews *de novo*. See *McGhan Med. Corp. v. Superior Court* (1992) 11 Cal.App.4th 804, 808. Although the PERL is liberally construed to protect the rights of PERS members, the doctrine of liberal construction does not permit a court to "pervert the plain language of the statute." *Gourley*, 48 Cal.App.3d at 161.

Here, the plain language of section 21153 does not support Setzler's contention. The plain language of Section 21153 imposes a duty on the employer not to "separate because of disability" a

1 PERS member who is "otherwise eligible to retire for disability." Section 21153 also requires the  
 2 employer to apply for a disability retirement on behalf of "any member believed to be disabled."  
 3 But Section 21153 does not mention reinstatement or specify any additional duties that the  
 4 employer must comply with if the member's disability retirement application is denied. Thus, the  
 5 plain language of section 21153 does not establish a clear, ministerial duty to reinstate a PERS  
 6 member whose disability retirement application has been denied.

7 A court of appeal recently reached this same conclusion in *Jones v. Los Angeles County*  
 8 *Office of Education* (2005) 134 Cal.App.4th 983, 990-992. In *Jones* the employee, like Setzler,  
 9 worked for a local entity, the Los Angeles County Office of Education (the "LACOE"), that, like  
 10 the City' Sheriff's Department, provided employees retirement benefits through the PERS. *Id.* at  
 11 985. Like Setzler, after Jones's disability retirement application was denied, she filed a writ petition  
 12 in which she argued that section 21153 imposed a ministerial duty on the LACOE to reinstate her  
 13 with back pay. *Id.* at 988. Like Setzler, after Jones's disability retirement application was denied,  
 14 she continued to maintain that she was incapable of returning to work. *Id.* at 987, 991.

15 The court of appeal upheld the trial court's denial of Jones's writ petition. *Id.* at 991. In  
 16 holding that the LACOE was not required to reinstate Jones after her disability application was  
 17 denied, the court of appeal held that "there was no statutory duty to pay plaintiff a full salary for a  
 18 job she would not perform." *Id.*<sup>3</sup>

19 Setzler does not cite any case holding that section 21153 imposes a clear, ministerial  
 20 reinstatement requirement on employers. Instead, Setzler relies on cases interpreting the CERL,  
 21 which as explained above is a distinct retirement law that does not apply to the City or Setzler. *Id.*  
 22 at 989 (the CERL and cases interpreting the CERL do not apply to employers and employees  
 23 covered by the PERL); *Pennington*, 20 Cal.App.3d at 58-60 (the PERL and CERL are distinct  
 24 statutory schemes, and courts must abide by the Legislature's decisions to treat "PERS members

25 <sup>3</sup> Jones was represented by the same attorney who represents Setzler: Edward L. Faunce. In  
 26 support of Setzler's Petition, Mr. Faunce has made the same arguments regarding section 21153 that  
 27 the court of appeal rejected when Mr. Faunce made them on Jones's behalf. See Grumbach  
 28 Declaration In Support of the City's Second Supplemental Brief, Ex. B at pp. 12-35 (Jones's  
 Appellant's Brief).

1 differently from CERL members"). Specifically, Setzler relies on language in section 31725 of the  
 2 CERL that requires a county to reinstate a CERL member with back pay if the member's disability  
 3 retirement application is denied.

4 Setzler's reliance on section 31725 is especially misplaced. As demonstrated by the  
 5 legislative history of the 1970 amendments to the CERL and PERL, section 31725 is an example of  
 6 a provision in which the Legislature specifically distinguished a county's duties under the CERL  
 7 from a municipality's duties under the PERL.

8 In 1970 the Legislature amended both the PERL and CERL by adding provisions that  
 9 restrict employers from separating employees who are eligible for a disability retirement. The  
 10 Legislature amended the PERL by adding the language quoted above from section 21153, which  
 11 provides that "an employer may not separate because of disability a member otherwise eligible to  
 12 retire for disability but shall apply for disability retirement of any member believed to be disabled."  
 13 Gov't Code § 21153 (West 2003) (citing Stats. 1970, c. 1447, §2, p. 2820).<sup>4</sup> At the same time, the  
 14 Legislature added an identical provision to section 31721(a) of the CERL. Compare Gov't Code  
 15 § 31721(a) (West 1988) (citing Stats. 1970, c. 1016, § 2, p. 1823) with Gov't Code § 21153.

16 That same year the Legislature also amended section 31725 of the CERL to add a  
 17 reinstatement provision to that statute. As amended, section 31725 provides that if a CERL  
 18 member's disability application is denied "and the employer has dismissed the member for disability  
 19 the employer shall reinstate the member to his employment effective as of the day following the  
 20 effective date of dismissal." Gov't Code § 31725 (West 1988) (citing Stats. 1970, c. 1016, § 1, p.  
 21 1823)).

22 Significantly, that same year the Legislature rejected a proposed amendment that would  
 23 have added an identical reinstatement requirement to the PERL. When initially introduced on  
 24 March 12, 1970, Assembly Bill No. 1153 proposed adding a provision to the PERL specifying that  
 25 if a PERS member's disability application is denied "and the employer has dismissed the member  
 26

27 <sup>4</sup> This language was added to former section 21023.5 of the PERL, which was later  
 28 recodified as section 21153. *Id.*

for disability the employer shall reinstate the member to his employment effective as of the day following the effective date of dismissal." Assem. Bill No. 1153 (1970 Reg. Sess.), as introduced March 12, 1970, § 3, pp. 3-4; *id.* at p. 1 (legislative counsel's digest). As Assembly Bill No. 1153 progressed through the Assembly and Senate, the Legislature deleted the reinstatement requirement. Assem. Amend. to Assem. Bill No. 1153 (1970 Reg. Sess.), as amended June 18, 1970, § 3, p. 4; *id.* at p. 1 (legislative counsel's digest); Sen. Amend. to Assem. Bill No. 1153 (1970 Reg. Sess.), as amended Aug. 4, 1970, § 2, p. 3; *id.* at p. 1 (legislative counsel's digest). As finally enacted, Assembly Bill No. 1153 did not add a reinstatement requirement to the PERL. *Id.*; Stats. 1970, c. 1447, pp. 2818-2822.<sup>5</sup>

Thus, the legislative history confirms that when imposing a reinstatement requirement on counties covered by the CERL, the Legislature deliberately elected not to impose a reinstatement requirement on municipalities covered by the PERL. See *Pennington*, 20 Cal.App.3d at 60 (because "[t]he acts of the Legislature have treated PERS members differently from CERL members," courts "must assume it intended the distinctions"); see also *In re Antonio F.* (2002) 98 Cal.App.4th 1227, 1232 ("[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed" (ellipses in original; internal quotations omitted)); *Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 555 (when the Legislature has rejected a provision that was part of an act when originally introduced, the act "should be construed according to the final version" and "should not be interpreted to include what was left out" (internal quotations omitted)).<sup>6</sup>

<sup>5</sup> None of the cases and administrative opinions cited by Setzler address the distinctions that the Legislature made between the CERL and PERL when amending those statutes in 1970.

<sup>6</sup> A 1999 amendment of the State Civil Service Act further demonstrates the Legislature's intent not to impose a reinstatement requirement on municipalities covered by the PERL. In 1999 the Legislature amended the State Civil Service Act to require the state to reinstate its employees with back pay when state employees' disability retirement applications are denied. Gov't Code § 19253.5 (Deering's Supp. 2004) (reviewing 1999 amendment, 1999 Statutes ch. 310, ). Although state employees are PERS members, the Legislature added this reinstatement requirement to the State Civil Service Act, which applies to the state's employees but not municipalities' employees. *Id.*; Gov't Code § 18526. If the Legislature wanted this reinstatement requirement to apply both to the state and to municipalities that contract with the PERS, the Legislature could have amended the (continued on next page)

In sum, the distinctions between the PERL's and the CERL's plain language and legislative history establish that the City did not have a clear ministerial duty under the PERL to reinstate Setzler when his disability retirement application was denied.

**IV. SETZLER CANNOT ESTABLISH THAT THE CITY VIOLATED SECTION 21153 BY REFUSING TO RETURN HIM TO WORK**

Even if the City did not have a ministerial duty to reinstate him, Setzler still contends that the Petition should be granted because the City violated section 21153 by separating him because of his disability. Although the City did not terminate Setzler, he argues that the City effectively separated him by allegedly refusing to return him to work.

**A. Setzler Cannot Relitigate His Previously Rejected Argument That The City Refused To Return Him To Work**

**1. Issue preclusion (collateral estoppel) bars the petition**

The doctrine of issue preclusion bars the Petition because Setzler is trying to relitigate an issue that was already decided in the proceeding on the First Petition: whether the City refused to return him to work.

Issue preclusion prevents relitigation of issues argued and decided in prior proceedings when: (1) the issue is identical to the one decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the issue was necessarily decided in the prior proceeding; (4) the prior decision is final and on the merits; and (5) preclusion is sought against the person who was a party in the prior proceeding. *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341. Where these requirements are met, issue preclusion applies if it will further the public policies of "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation." *Id.* at 343.

(footnote continued from previous page)

PERL. By adding this reinstatement requirement to the State Civil Service Act instead of the PERL, the Legislature again elected not to impose a reinstatement requirement on municipal employers like the City who contract with the PERS.

None of the cases and administrative opinions cited by Setzler address the distinctions that the Legislature has made between state employees who are covered by the State Civil Service Act and municipal employees who are not.

1 In the proceedings on Setzler's First Petition, he fully litigated the same issue he raises here:  
 2 whether the City refused to return him to work. (Benjamin Decl. ¶¶ 10-31, Ex.'s K-GG.) Setzler  
 3 repeatedly raised this issue to the Court and the court of appeal, devoting entire sections of briefs to  
 4 it and discussing it in oral arguments. (Benjamin Decl. ¶¶ 10-31, Ex.'s K-GG.) Rejecting Setzler's  
 5 argument that the City had refused to return him to work, the Court and the court of appeal  
 6 specifically found that Setzler had not made a good faith effort to return to work. (*Id.* Ex's W, CC-  
 7 3, FF.)

8 Thus, all the prerequisites for issue preclusion are satisfied. The issue of whether the City  
 9 refused to return Setzler to work was actually—in fact, *extensively*—litigated and necessarily  
 10 decided on the merits in the prior proceeding, which is now final. See *Lucido*, 51 Cal.3d at 342  
 11 (issue preclusion broadly applies to any issue previously decided that was not "entirely unnecessary  
 12 to the judgment in the initial proceeding" (internal quotations omitted)). And issue preclusion is  
 13 being applied against Setzler, who was also the petitioner in the prior proceeding. *Id.* at 341.

14 Setzler argues that issue preclusion does not apply because neither the parties nor the courts  
 15 addressed section 21153 in the proceeding on the First Petition. This argument lacks merit. The  
 16 "identical issue requirement addresses whether identical factual allegations are at stake in the two  
 17 proceedings, not whether the ultimate issues or dispositions are the same." *Lucido*, 51 Cal.3d at 342  
 18 (internal quotations omitted); *Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 482 (issue  
 19 preclusion barred plaintiff's FEHA claim alleging employment discrimination even though in  
 20 proceedings on his earlier, unsuccessful wrongful discharge claim he had not cited the FEHA or  
 21 argued that he had been subjected to race discrimination). The factual allegations that Setzler raises  
 22 here are identical to the factual allegations that he raised in the proceeding on his First Petition. In  
 23 both instances, Setzler argues that he has tried to return to work since 1990 but the City has refused  
 24 to allow him to do so. Compare, e.g., Setzler's Op. Brief at 2-3, 8-10 (Setzler's factual allegations in  
 25 the current proceeding) with Benjamin Decl. Ex. EE at 3-14, 17-19 (Setzler's factual allegations in  
 26 his appellate brief from the earlier proceeding).

27 Application of issue preclusion to the Petition will also further the public policies discussed  
 28 in *Lucido*. 51 Cal.3d at 343. Granting the Petition would undermine the integrity of the Court's and

the court of appeal's decisions. *Castillo*, 92 Cal.App.4th at 483 (possibility of inconsistent judgments undermines integrity of judicial system). Applying issue preclusion will further judicial economy by eliminating the need for the Court to review—again—the extensive record in the prior proceeding, including the extensive evidentiary record and the ten briefs in which the parties previously addressed this issue (Benjamin Decl. Ex's M-P, X-AA, CC-2, EE). *Castillo*, 92 Cal.App.4th at 483. Applying issue preclusion here is also appropriate in light of the over 14 years of administrative actions and litigation that Setzler has pursued against the City, all of which arise from a disability claim that the Court has found was not credible (Benjamin Decl. Ex. W). *Castillo*, 92 Cal.App.4th at 483-484.<sup>7</sup>

## 2. Claim preclusion (*res judicata*) bars the petition

Claim preclusion provides an alternative reason to deny the Petition. Claim preclusion bars the relitigation of an entire claim (rather than a specific issue) when: (1) the claim is identical to the one presented in the prior proceedings; (2) the prior proceeding resulted in final judgment on the merits; and (3) preclusion is being asserted against a party to the prior proceeding. *Bernhard v. Bank of America Nat. Trust & Savings Ass'n* (1942) 19 Cal.2d 807, 813.

Claim preclusion bars the Petition because in the prior proceeding, a final judgment was entered denying Setzler's claim that the City had refused to return him to work. (Benjamin Decl. Ex's W, CC-3, FF, GG.) Although Setzler sought disability retirement benefits in the prior administrative mandate proceeding and seeks "reinstatement" with back pay in the current traditional mandate proceeding, claim preclusion still bars the Petition under the primary rights theory that California courts apply to determine whether two claims are identical. *Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170, 1174. Under the primary rights theory, "if two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit plaintiff pleads different theories of recovery, seeks

<sup>7</sup> For the reasons explained above, issue preclusion also bars Setzler from relitigating the findings in the First Petition proceeding that his: (1) claims to suffer from a disabling foot injury were not credible; (2) objections to the Retirement Board's evidence lack merit; and (3) allegations that the Sheriff's Department must offer him a permanent light duty position lack merit. (Benjamin Decl. ¶¶ 5-33, Ex's D-F, L, M-O, U, V, W-Z, CC-2-CC-4, EE, FF.)

different forms of relief and/or adds new facts supporting recovery." *Id.*; *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1473-1476, 1481-1485 (claims based on the same adverse employment action are precluded if not brought in the same lawsuit.)

In the prior proceeding, Setzler claimed that that the City had refused to return him to work. Now Setzler seeks to revive that same claim by seeking different relief for the same alleged injury—Setzler's purported dilemma of being left without employment or a disability retirement—and same alleged wrongful conduct—the City's purported refusal to return him to work. But since the alleged injury and wrongful conduct are the same, the claims are the same. *Eichman*, 147 Cal.App.3d at 1174; *Takahashi*, 202 Cal.App.3d at 1473-1476, 1481-1485.<sup>8</sup>

### 3. Issue and claim preclusion bar the entire petition

Because Setzler's Petition reiterates old allegations regarding events that occurred before the court of appeal's decision in the earlier proceeding became final on June 13, 2000, issue and claim preclusion bar the entire Petition. See *Eichman*, 147 Cal.App.3d at 1174 (holding that plaintiffs were precluded from "seeking recovery for acts which occurred before judgment was entered in the

<sup>8</sup> In *Eichman*, for example, the court held that claim preclusion barred the plaintiffs' claims in a second proceeding, even though plaintiffs had pleaded a claim violations of "California's Unfair Trade Practices Act (Bus. & Prof. Cod, § 17000 *et seq.*)" in the first proceeding and common law claims for "breach of contract, restraint of trade, monopoly, fraud, conversion, accounting, breach of fiduciary duty and declaratory relief" in the second proceeding. 147 Cal.App.3d at 1173-1174. The court held that claim preclusion barred the plaintiffs' complaint in the second proceeding because:

[t]he same primary right argued here was clearly also at stake in the Eichmans' first action against Fotomat. In both cases the harm alleged was economic injury caused by Fotomat creating a situation in which the company-owned stores enjoy a competitive edge over the franchise stores. The same types of wrongful acts by Fotomat were alleged in both suits: the provision of greater service at a lower cost to the company-owned stores, failure to provide the franchisees with the same advertising assistance given the company-owned stores and the placement of company-owned stores within areas which should have been reserved for franchise stores. The complaint here merely adds new theories of recovery and greater detail regarding the prices Fotomat charged the Eichmans. The superior court correctly found this suit raises the same causes of action as did the first action.

*Id.* at 1175.

1 first action").<sup>9</sup> Setzler has not produced any new evidence showing that the City refused to return  
 2 him to work after June 13, 2000. (Setzler Brief at 1-13; Setzler Decl.; Hebel Decl.)

3 Setzler, however, argues that issue and claim preclusion should not apply here because the  
 4 City allegedly concealed information from him in the proceeding on the First Petition. This  
 5 argument lacks merit for two reasons. First, Setzler cannot avoid the preclusive effects of an earlier  
 6 judgment by introducing new evidence, even if, as he contends, the City had improperly or  
 7 fraudulently concealed this evidence in the earlier proceeding. *Eichman*, 147 Cal.App.3d at 1175-  
 8 1176 ("fraud or perjury by a party, which goes undiscovered until after judgment is entered, does  
 9 not affect the finality and conclusiveness of the judgment").<sup>10</sup> Second, the information allegedly  
 10 concealed here "would have been discovered had [Setzler] diligently investigated [his] case" in the  
 11 earlier proceeding. *Id.*<sup>11</sup>

#### 12 B. The Petition Lacks Merit

13 Even if the Petition is not precluded, it lacks merit.  
 14

15 <sup>9</sup> As further explained in *Eichman*:

16 The principles of res judicata demand that the parties present their entire case  
 17 in one proceeding. Public policy requires that pressure be brought upon  
 18 litigants to use great care in preparing cases for trial and in ascertaining all  
 19 the facts. A rule which would permit the re-opening of cases previously  
 20 decided because of error or ignorance during the progress of the trial would  
 21 in a large measure vitiate the effects of the rules of res judicata. Courts deny  
 22 relief, therefore, when the fraud or mistake is intrinsic; that is, when it goes to  
 23 the merits of the prior proceedings, which should have been guarded against  
 24 by the plaintiff at that time.

25 147 Cal.App.3d at 1176, internal quotations and citations omitted.

26 <sup>10</sup> Setzler has not shown that the City wrongfully concealed evidence or engaged in fraud or  
 27 perjury.

28 <sup>11</sup> Citing *Roccaforte v. City of San Diego* (1979) 89 Cal.App.3d 877 and *English v. Board of*  
 29 *Admin.* (1983) 148 Cal.App.3d 839, Setzler also argues that under the doctrines of issue and claim  
 30 preclusion, the City should be bound by the Retirement Board's determination that Setzler was not  
 31 incapacitated from performing a deputy sheriff's duties. Setzler's reliance *Roccaforte* and *English*  
 32 is misplaced. The First District Court of Appeal has held that the City and the Retirement Board are  
 33 separate entities who are not bound by each others' determinations. *Geoghegan v. Retirement Bd.*  
 34 *Traub v Board of Retirement* (1983) 34 Cal.3d 793, 798-799 (holding that because a retirement  
 35 board was a separate entity from a local governmental employer, no privity existed for purposes of  
 36 issue or claim preclusion)).

1                   1.       Standard for reviewing the record

2                   While traditional mandamus "may be employed to compel performance of a duty which is  
3 purely ministerial in character, it cannot be applied to control discretion as to a matter lawfully  
4 conferred upon an administrative agency or . . . the governing board of a municipality." *Duff*, 108  
5 Cal.App.3d at 935-936. Where, as here, the respondent was not implementing a purely ministerial  
6 duty, a court's inquiry is generally "limited to whether the decision was arbitrary, capricious, or  
7 entirely lacking in evidentiary support." *DeCuir*, 64 Cal.App.4th at 81.

8                   In the proceeding on Setzler's First Petition for a writ of administrative mandate, the Court  
9 exercised its independent judgment in reviewing the record. (Benjamin Decl. Ex. W.) That  
10 standard of review was appropriate because the First Petition sought an administrative writ of  
11 mandate and concerned Setzler's vested right to retirement benefits. *Strumsky v. San Diego Cty.*  
12 *Employees Retirement Ass'n* (1974) 11 Cal.3d 28, 44-45 (when review is sought by administrative  
13 mandate and involves a fundamental vested right, courts must exercise their independent judgment  
14 on the evidence).

15                   But the independent judgment standard is not the appropriate standard to apply to the record  
16 in Setzler's current Petition. First, Setzler is seeking a traditional writ of mandate, not an  
17 administrative writ as in the First Petition. *DeCuir*, 64 Cal.App.4th at 81 (standard of review for  
18 administrative writ does not apply when petitioner seeks a traditional writ). Second, the current  
19 Petition, unlike the First Petition, does not involve a fundamental vested right. Although as a  
20 probationary employee Setzler has vested rights to PERS retirement benefits, he does not have a  
21 vested right to continued employment with the City. *Duff*, 108 Cal.App.3d at 936-937.<sup>12</sup> Third,  
22 under the PERL, the City retains discretion to administer its own personnel policies. *Gourley*, 48  
23 Cal.App.3d at 163. While section 21153 prohibits the City from arbitrarily separating Setzler  
24 because of his disability, the City retains discretion to: separate a probationary employee like  
25 Setzler for other reasons, *Duff*, 108 Cal.App.3d at 936-937; administer the City's personnel policies,

26  
27 <sup>12</sup> In *Jones*, the court of appeal applied an independent judgment standard of review because  
28 *Jones*, unlike Setzler, was a permanent civil service employee with a vested property right in her  
job. *Jones*, 134 Cal.App.4th at 985, 989-990.

1 such as its return to work policy, *Gourley*, 48 Cal.App.3d at 156; or determine how long Setzler was  
 2 entitled to remain on paid status under the City's sick leave and vacation policies, *Campbell*, 84  
 3 Cal.App.3d at 348-350.

4 Thus, the arbitrary and capricious standard is the proper standard of review to apply to the  
 5 record in Setzler's current Petition. *DeCuir*, 64 Cal.App.4th at 81.<sup>13</sup>

6 2. The evidence does not establish that the city violated section 21153

7 Setzler has not shown that the City expressly or impliedly separated him in violation of  
 8 section 21153.

9 It is undisputed that at all times since Setzler was injured in 1990, he has remained a City  
 10 employee. (Harrigan Decl. ¶ 3; Setzler Depo. at 83.) And Setzler concedes that he cannot establish  
 11 a "separation" under section 21153 merely because he was not on paid status while he was seeking a  
 12 disability pension. (Setzler Opening Brief at 5.)<sup>14</sup>

13 After Setzler's disability application was denied, the City offered to return Setzler to work in  
 14 a manner consistent with the authority that it retained under the PERL to administer the City's  
 15 personnel policies. See above at 17, citing *Duff*, 108 Cal.App.3d at 936-937, *Gourley*, 48  
 16 Cal.App.3d at 156, and *Campbell*, 84 Cal.App.3d at 348-350. The City repeatedly offered Setzler  
 17 three ways to return to work. First, Setzler could have returned to full duty as a deputy sheriff if he  
 18 was medically capable of performing the job's essential functions. Second, Setzler could have  
 19 returned to full duty as a deputy sheriff with reasonable accommodations that would have allowed  
 20 him to perform the job's essential functions. Third, Setzler could have transferred to another City  
 21 job under the City's disability transfer program. (Harrigan Decl. ¶¶ 5-12, Ex's A-D.) Cf. *Bruce v.*

22  
 23 <sup>13</sup> Even under the independent judgment standard, the evidence discussed below establishes  
 that Setzler is not entitled to writ relief.

24 <sup>14</sup> Setzler claims that he was separated in 1991 when he contends that City sent him home  
 25 after he tried to return to his job as a deputy sheriff. But Setzler has not produced any admissible  
 26 evidence to support this claim. Moreover, his argument that he was separated in 1991 is negated by  
 27 his admission that he remained on paid status until at least March 1996. (Benjamin Decl. Ex. EE at  
 10.) And his contention that he made a good faith effort to return to work as a deputy sheriff in  
 1991 is undermined by his repeated insistence in his pleadings and deposition testimony that he has  
 28 been incapable of working as a deputy sheriff since his 1990 injury. (Benjamin Decl. Ex's H, K, Y,  
 EE; Setzler Depo. at 35-37, 151-152.)

1 *Gregory* (1967) 65 Cal.2d 666, 671 ("mandamus will not be employed where the respondents show  
2 that they are willing to perform the duty without the coercion of the writ" (internal quotations  
3 omitted)).

4 Rebuffing the City's offers, Setzler failed to make a good faith effort to return to work.  
5 While consistently maintaining that he could not return to full duty as a deputy sheriff, Setzler has  
6 declined to participate in the City's disability accommodation process, under which he could have  
7 returned to work as a deputy sheriff with reasonable accommodations or obtained a disability  
8 transfer to a new position. (Harrigan Decl. ¶¶ 5-12; Setzler Depo. at 30:21-23, 35:8-20-21, 36:21-  
9 37:2, 151:20-152:17.) Setzler admits that he deliberately chose not to engage in the disability  
10 accommodation process. (Setzler Depo. at 30-31.) And in an August 14, 1996 letter to the City,  
11 Setzler's former attorney explicitly rejected the City's offer to return Setzler to work through the  
12 disability accommodation process. (Harrigan Decl. Ex. D at 1, 3.)

13 Because Setzler did not file a claim under the Fair Employment and Housing Act (the  
14 "FEHA"), that statute does not provide the controlling rules of law for evaluating the Petition. Yet  
15 since the FEHA prohibits separating employees because of their disabilities, cases decided under  
16 the FEHA provide useful guidance in interpreting the similar language in section 21153 of the  
17 PERL.<sup>15</sup> Under the FEHA, an employer cannot be held liable for separating an employee because  
18 of a disability where, as here, the employee has declined to participate in the reasonable  
19 accommodation process. *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263 (no liability  
20 under FEHA where "reasonable accommodation was offered and refused").

21 The City also provided Setzler with vocational rehabilitation to become a computer  
22 technician through the City's workers' compensation system. (Setzler Depo. at 744-746.) But  
23 Setzler has not worked as a computer technician, either for the City or other employers. (*Id.* at 756-  
24

25 <sup>15</sup> Compare Gov't Code § 12940(a) (providing that, under the FEHA, it is unlawful for "an  
26 employer, because of the . . . physical disability [or] mental disability . . . of any person . . . to  
27 discharge the person from employment . . .") with Gov't Code § 21153 (providing that, under the  
PERS, "an employer may not separate because of disability a member otherwise eligible to retire for  
disability"); see also *In re Do Kyung K.*, 88 Cal.App.4th 583, 589 (2001) (similar language in  
legislative purpose).

758.) Instead of returning to work, Setzler continued to seek a disability pension, even after his application was denied. (*Id.* at 591:11-592:14; Benjamin Decl. Ex. HH.) *Jones*, 134 Cal.App.4th at 987-988, 991-992 (employee was not entitled to reinstatement with back pay under section 21153 after being denied a disability pension where employee continued to insist she was physically incapable of returning to either her former position or a new position she had been trained to perform through a vocational rehabilitation program).

Setzler cites no authority holding that in these circumstances an employer has been found to have separated an employee in violation of Section 21153. Instead, Setzler relies on cases involving county employees who sought relief under section 31725 of the CERL. See, e.g., Setzler Reply Brief at 3-6, citing *McGriff*, 33 Cal.App.3d at 399; *Phillips v. County of Fresno* (1990) 225 Cal.App.3d 1240; *Hanna v. Los Angeles County Sheriff's Dept.*, 102 Cal.App.4th 887. But because the PERL and CERL are distinct statutes with different provisions regarding employees' reinstatement rights, these cases are not pertinent to Setzler's Petition. See above at 8, 10-12. These cases are further distinguishable because they involve employers who, unlike the City, terminated the employee (*McGriff*, 33 Cal.App.3d at 395) or refused to reinstate the employee while denying him any alternative job opportunity (*Phillips*, 225 Cal.App.3d at 1244-1247; *Hanna*, 102 Cal.App.4th at 891).

Writ relief also will not issue under the PERL on behalf of an employee, like Setzler, who is unwilling to return to work. As explained in *Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, "there is an obvious distinction between an employee who has become medically *unable* to perform his usual duties and one who has become *unwilling* to do so. Disability retirement laws address only the former." *Id.* at 1304 (denying writ petition brought by PERS member who was denied a disability pension after being terminated because he was unwilling to perform his job).

Because the PERL addresses only "unable" employees and not "unwilling" employees, *id.*, Setzler cannot meet his burden of showing that he is entitled to the performance of any duty that the City might have under the PERL. See *San Gabriel Tribune*, 143 Cal.App.3d at 771 (petitioners seeking writ relief must show that they are entitled to the performance of the act that they seek to

1 compel). Among other evidence that Setzler is an "unwilling" employee who has not made a good  
 2 faith effort to return to work, he has: exaggerated the extent of his foot injury (Benjamin Decl. ¶¶ 6-  
 3 33, Ex's B at 93-97, D at 10, C at 15:8-25, 16:1-14, E, I, J);<sup>16</sup> repeatedly rebuffed the City's efforts  
 4 to return him to work (Harrigan Decl. ¶¶ 5-12; Setzler Depo. at 30:21-23, 35:8-20-21, 36:21-37:2,  
 5 151:20-152:17); and not worked as a computer technician, although he is physically capable of  
 6 doing so (Setzler Depo. at 591:11-592:14, 597-598, 744-746, 756-758). In brief, an employer  
 7 cannot be said to have separated an employee who has not made a good faith effort to return to  
 8 work.

9 Moreover, as illustrated by the decision in *Alvarez-Gasparin v. County of San Bernardino*  
 10 (2003) 106 Cal.App.4th 183, the City's conduct here would satisfy even the CERL's more stringent  
 11 reinstatement provision. In *Alvarez-Gasparin* the employer, like the City, offered vocational  
 12 rehabilitation, reasonable accommodations, and disability transfers to an employee while her  
 13 disability retirement application was pending. *Id.* at 185. The employee, however, did not return to  
 14 work for nine years (*id.* at 185-186, 188), although unlike Setzler she eventually returned to her job  
 15 one year after her disability retirement application was denied (*id.* at 186). Like Setzler, however,  
 16 the employee filed a writ petition seeking back pay for the time she was off work before and after  
 17 her disability application was denied. *Id.* at 186-187. Like Setzler, the employee also argued that  
 18 she was entitled to writ relief because her employer had effectively dismissed her by allegedly  
 19 failing to return her to work earlier. *Id.*

20  
 21 <sup>16</sup> According to Setzler, his foot injury causes him to limp, requires him to walk with a cane,  
 22 and upsets his sense of balance so severely that he has trouble walking on stairs or even just  
 23 carrying a cup of coffee. (Benjamin Decl. ¶ 7, Ex. B at 59:9-24, 62:18-23, 63:2-17, 65:21-25, 66:1-  
 24 11.) Evidence that his complaints are not credible includes: medical reports from doctors who  
 25 concluded that Setzler was not disabled coupled with the lack of objective medical evidence  
 26 supporting Setzler's complaints (*id.* Ex's E, I, J); testimony from a witness who saw Setzler walking  
 27 without a limp in City Hall—until Setzler turned to walk into the Sheriff's office, when he began  
 28 limping (*id.* Ex. C 15:8-25, 16:1-14); videotape of Setzler walking normally without a cane,  
 including shots of him ascending and descending stairs and carrying luggage in both hands without  
 a limp or balance problems (*id.* Ex. D at 10); and Setzler's admissions that his foot problems did not  
 prevent him from taking extended trips to Europe (*id.* Ex. B at 93-97). In light of this evidence,  
 Setzler's "subjective complaints of problems with balance, unsteadiness, difficulty with gate and  
 lack of confidence in his left lower extremity are not credible." (*Id.* Ex. W at 2:13-15 (Aug. 14 1998  
 Statement of Decision and Order Denying Petition for Writ of Mandate).

Because the employer, like the City, had offered the employee vocational rehabilitation, reasonable accommodations, and disability transfers, the *Alvarez-Gasparin* court rejected the employee's argument that her employer had refused to return her to work. *Id.* at 188. The court concluded that:

The evidence does not prove what plaintiff would like it to prove. *There is simply no showing that plaintiff was dismissed, expressly or impliedly. For that reason, this case differs from the cases relied upon by plaintiff in which the employee is fired, denied any comparable job opportunity with the public employer, or refused reinstatement.* In October 1991, plaintiff effectively stopped working for the County and in the intervening nine years, her employment status was admittedly uncertain. But that does not mean she was dismissed for disability and entitled to a remedy under section 31725.

*Id.* (emphasis added, internal footnotes and citations omitted); see also *id.* at fn's 7-9 (distinguishing *Hanna*, *McGriff*, *Phillips* and other § 31725 cases cited by Setzler).

Likewise, Setzler cannot establish that the City refused to return him to work when the City provided him vocational rehabilitation and offered to return him to full duty, provide him reasonable accommodations in his current position as a deputy sheriff, or provide him a disability transfer him to another position. As in *Alvarez-Gasparin*, "there is simply no showing that [Setzler] was dismissed, expressly or impliedly." *Id.*<sup>17</sup>

#### V. WRIT RELIEF CANNOT ISSUE BECAUSE SETZLER HAS UNCLEAN HANDS

Writ relief also is not available for a petitioner like Setzler who comes to the Court with unclean hands. *Elliott v. Contractors' State License Bd.* (1990) 224 Cal.App.3d 1048, 1054.

Setzler has a history of bad faith conduct with the Retirement Board, the Sheriff's Department, and the Court. Setzler made false claims about his foot injury, leading the Court to conclude that he was

<sup>17</sup> Setzler's counsel essentially agreed that if the facts here are analogous to those in *Alvarez-Gasparin*, then Setzler was not separated. At oral argument, Setzler's counsel stated that:

Alvarez-Gasparin, I am the attorney who represented her in front of the Board of Retirement. I can tell you that I didn't take her reinstatement case and I can tell you why. Another attorney took it and *he couldn't find any evidence that she had been separated.* He argued by saying well, she was given voc[atational] rehab[ilitation], therefore she must have been separated and *the court said must have is not good enough.* (Reporter's Transcript at 54:7-13 (July 18, 2005) (emphasis added).)

1 a "malingerer" whose allegations about suffering from a disability were not credible. (Benjamin  
2 Decl. ¶¶ 6-33, Ex. CC-3 14:4-12.) Setzler treated the return to work process as a cat and mouse  
3 game by randomly appearing at the Sheriff's Department while ducking the City's efforts to return  
4 him to work. (Harrigan Decl. ¶¶ 3-12.) And Setzler filed the Petition and this motion without  
5 mentioning that the Court and the court of appeal had repeatedly rejected his argument that the City  
6 had refused to return him to work. (Setzler Brief at 2:21-3:4.)

7 Setzler argues that his bad faith conduct should be excused because the City has acted in bad  
8 faith too. But Setzler has not shown that the City has unclean hands. To support his claim that the  
9 City acted in bad faith, Setzler cites Sheriff Hennessey's January 30, 2004 letter to the Retirement  
10 Board. (Hebel Decl. Ex. 2.) In this letter, the sheriff asked the Retirement Board to reopen Setzler's  
11 disability retirement application to investigate Setzler's complaints that "possible fraudulent  
12 behavior" had marred the review of his application. *Id.* But in the proceedings on the First Petition,  
13 the Retirement Board, the Court, and the court of appeal considered and rejected Setzler's  
14 complaints about the manner in which his application was reviewed. (E.g., Benjamin Decl. Ex's W  
15 at 1-2, EE at 26-27, FF at 4, 8.) Moreover, in the January 30, 2004 letter, the sheriff does not assert  
16 that any fraud had actually occurred. (Hebel Decl. Ex. 2.) The letter merely notifies the Retirement  
17 Board of Setzler's complaints of "possible fraudulent behavior" and requests that the Retirement  
18 Board investigate these complaints, even though the "outcome of the application for disability  
19 retirement may well be the same as your prior ruling." (Hebel Decl. Ex. 2; Harrigan Decl. ¶ 17.)

## 20 21 VI. THE PETITION IS BARRED ON PROCEDURAL GROUNDS

### 22 A. Laches

23 The doctrine of laches also bars the Petition. See *Vernon Fire Fighters Ass'n v. City of*  
24 *Vernon* (1986) 178 Cal.App.3d 710, 719 (upholding denial of writ petition based on five-year delay  
25 in bringing the petition to hearing and evidence that respondent "suffered some prejudice"). Under  
26 the laches doctrine if "there is a delay in prosecuting the mandamus action, the burden of showing  
27 that the delay is reasonable or excusable is on the petitioner." *Id.* "If the delay is found

1 unreasonable," the respondent must show either that "petitioner has acquiesced in the act  
2 complained of or that respondent has suffered some prejudice." *Id.*

3 Setzler waited almost five years after filing his Petition in July 2000 before bringing it to  
4 hearing in July 2005. But he has not met his burden of showing that this five-year delay was  
5 "reasonable or excusable." *Id.* (Benjamin Decl. Ex. HH.)

6 Setzler contends that the five-year delay should be excused because he was conducting  
7 discovery. The parties, however, completed their written discovery in 2002; the City has not taken  
8 a deposition since 2002; and the one deposition that Setzler conducted was completed in 2001.  
9 (Hebel Supp. Decl. ¶¶ 5-17.) And although Setzler contends that he was waiting for the City to  
10 provide him with copies of exhibits from his deposition, he does not explain why he did not obtain  
11 copies from the court reporter before she sent the City the original exhibits, or why he did not more  
12 diligently pursue obtaining copies from the City. (Faunce Decl. ¶¶ 3-4.)

13 The five-year delay is not excused by Setzler hiring a new attorney last year. Setzler's new  
14 attorney filed a substitution of counsel notice in August 2004, almost a year before the hearing.  
15 And Setzler's former attorney continued to participate in the case. In June and July 2005, Setzler's  
16 former attorney filed two declarations in support of Setzler's motion to grant the Petition. (Hebel  
17 Decl. and Hebel Supp. Decl.)

18 Setzler also asserts that the five-year delay should be excused because he was seeking to  
19 reopen his disability retirement application. The Retirement Board, however, refused this request in  
20 May 2004, more than 14 months before Setzler brought the Petition to hearing.

21 Finally, Setzler argues that the five-year delay should be excused because he was engaged in  
22 settlement negotiations with the City. But the parties have not participated in a settlement  
23 conference since December 2002. (Hebel Supp. Decl. ¶ 19.) Setzler nevertheless asserts that the  
24 delay should be excused because he was still trying to settle his case through letters that he  
25 exchanged with the City between November 2004 and April 2005. (Faunce Decl. Ex's 1-5.) During  
26 this exchange of letters, the City stated that it would consider a settlement demand from Setzler if  
27 he specified the total monetary relief he was seeking. (*Id.* Ex's 1, 3.) But Setzler did not respond  
with a specific monetary demand, and the parties never exchanged settlement offers. (*Id.* Ex's 1-5.)

1 Thus, the letters do not show the parties engaging in active settlement negotiations this year. In any  
 2 event, Setzler's offer to resume settlement discussions at the final hour cannot excuse his five-year  
 3 delay in bringing the Petition to hearing. To find otherwise would deter respondents in a writ action  
 4 from discussing settlement on the eve of a hearing or trial.

5 Because Setzler has not shown that the five-year delay was reasonable or excusable, the  
 6 delay bars the Petition if the City meets its burden of showing that it "suffered some prejudice."  
 7 *Vernon Fire Fighters*, 178 Cal.App.3d at 719. The City has met its burden. The City "suffered  
 8 some prejudice" because: (1) the delay could significantly increase the back pay or other monetary  
 9 relief awarded to Setzler; (2) Setzler is seeking back pay for work that other deputy sheriffs have  
 10 already been paid to perform; (3) witnesses mentioned in Setzler's pleadings have retired; and (4)  
 11 Setzler's allegations concern events that occurred as long ago as 1991 (Harrigan Decl. ¶ 20). See  
 12 *Vernon Fire Fighters*, 178 Cal.App.3d at 723, 726.

#### 13 B. Setzler Failed To Exhaust His Administrative Remedies

14 To the extent that Setzler is arguing that the City violated its own return to work policy, his  
 15 Petition is barred because he failed to exhaust his administrative remedies under the Memorandum  
 16 of Understanding (MOU) between the City and Setzler's union (Harrigan Decl. ¶¶ 13, 18, Ex. D).  
 17 *Edgren v. Regents of the University of California* (1984) 158 Cal.App.3d 515, 519, 523 (employees  
 18 must exhaust public employers' internal administrative procedures before seeking relief in court);  
 19 *Johnson v. Hydraulic Rsrch. & Mfg. Co.* (1977) 70 Cal.App.3d 675, 679 (exhaustion requirement  
 20 applies to labor agreements' grievance and arbitration procedures).

21 The MOU includes a grievance procedure that culminates in binding arbitration and is the  
 22 exclusive remedy for resolving disputes arising out of the City's application of the MOU's  
 23 provisions. (Harrigan Decl. ¶¶ 13, 18, Ex. D.) Although the MOU includes a return to work  
 24 provision, Setzler did not file a grievance and did not exhaust his arbitration remedies. (*Id.* ¶ 18.)  
 25 But an employee must exhaust a labor agreement's grievance and arbitration procedures before  
 26 filing a civil action that "is substantially dependent upon analysis of the terms of [the] agreement."  
 27 *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 219-220; *DFEH v. Verizon California, Inc.*

1 (2003) 108 Cal.App.4th 160, 170-171 (employee's claim was barred because it required a court to  
2 interpret a collective bargaining agreement).

3  
4 CONCLUSION

5 The Petition is DENIED in its entirety. The City shall recover its costs.

6  
7 Dated: 2/28/06

JAMES L. WARREN

8 THE HONORABLE JAMES L. WARREN  
9 JUDGE OF THE SUPERIOR COURT  
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PROOF OF SERVICE

I, WANDA TAI TAKAO, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102.

On February 17, 2006, I served the following document(s):

- [REVISED PROPOSED] STATEMENT OF DECISION DENYING MOTION TO GRANT WRIT PETITION

on the following persons at the locations specified:

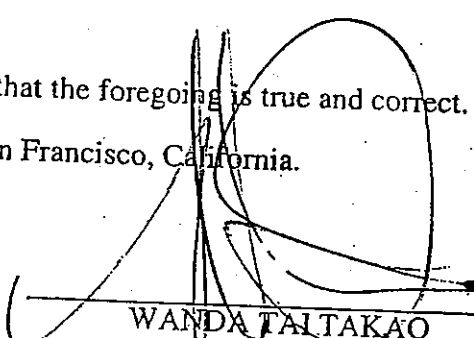
Edward Faunce  
43020 Blackdeer Loop, Suite 206  
Temecula, CA 92590

in the manner indicated below:

- ☒ **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

I declare under penalty of perjury that the foregoing is true and correct.

Executed February 17, 2006, at San Francisco, California.

  
WANDA TAI TAKAO

**PROOF OF SERVICE**

I, WANDA TAI TAKAO, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102.

On March 1, 2006, I served the following document(s):

- **NOTICE OF ENTRY OF STATEMENT OF DECISION DENYING MOTION TO GRANT WRIT PETITION**

on the following persons at the locations specified:

Edward Faunce  
43020 Blackdeer Loop, Suite 206  
Temecula, CA 92590

in the manner indicated below:

- ☒ **BY FACSIMILE:** Based on a written agreement of the parties to accept service by fax, I transmitted true and correct copies of the above document(s) via a facsimile machine at telephone number (415) 554-4248 to the persons and the fax numbers listed above. The fax transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine, and a copy of the transmission report is attached.

I declare under penalty of perjury that the foregoing is true and correct.

Executed March 1, 2006, at San Francisco, California.

WANDA TAI TAKAO



DENNIS J. HERRERA  
City Attorney

ANTHONY GRUMBACH  
Deputy City Attorney  
DIRECT DIAL: (415) 554-3947

FACSIMILE COVER SHEET

Wednesday, March 01, 2006; Time: 5:23 PM

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FROM:	OF:	PHONE:	FAX:
Anthony Grumbach	Deputy City Attorney	(415) 554-3947	(415) 554-4248

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I, WANDA TAI TAKAO, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102.

On March 2, 2006, I served the following document(s):

- **NOTICE OF ENTRY OF STATEMENT OF DECISION DENYING MOTION TO GRANT WRIT PETITION**

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Edward Faunce  
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I declare under penalty of perjury that the foregoing is true and correct.

Executed March 2, 2006, at San Francisco, California

WANDA TAI TAKAO